

November 26, 1991

Ms. Elizabeth C. Clancey
AFSCME Representative
American Federation of State, County and
Municipal Employees
888 Mililani Street, Suite 101
Honolulu, Hawaii 96813

Dear Ms. Clancey:

Re: Disclosure of Interview Scores and Interview Panelists'
Notes Concerning Employment Applicants

This is in response to your letter dated October 2, 1991 requesting an advisory opinion concerning whether the State of Hawaii Judiciary must, upon request, publicly disclose the summary of interview scores and the interview panelists' notes concerning applicants for a Program Budget Analyst VII position ("applicants").

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Judiciary must permit public inspection and copying of the summary of interview scores compiled concerning the applicants for a Program Budget Analyst VII.

II. Whether, under the UIPA, the Judiciary must permit public inspection and copying of the interview panelists' notes concerning the applicants.

BRIEF ANSWER

I. The "Summary of Rating for Program Budget Analyst VII"

("interview scores summary") lists the interview scores given by the interview panelists to applicants, but does not reveal the identities of the applicants who received the corresponding interview scores. Therefore, because the interview scores summary does not identify the applicants, we find that the applicants do not have a privacy interest in this record. Even if we assumed that the applicants may have a privacy interest in this record, we find that there is at least a "scintilla" of public interest in the interview scores summary because it sheds light upon government hiring practices. Thus, the disclosure of the interview scores summary would not constitute a clearly unwarranted invasion of privacy under the UIPA.

Furthermore, the disclosure of the interview scores summary would not frustrate a legitimate government function because this record does not reveal any individually identifiable information about applicants which, if disclosed, would discourage future applicants for other positions. Consequently, we find that no UIPA exception applies to the interview scores summary. Therefore, this record must be made available for public inspection and copying.

II. The interview panelists' notes are predecisional and deliberative because they reflect the "give and take" that occurs within the agency before the applicant selection. Therefore, we believe that the interview panelists' notes are not required to be disclosed in order to "avoid the frustration of a legitimate government function," namely, the decisionmaking that occurs during the selection process. Haw. Rev. Stat. . 92F-13(3) (Supp. 1990).

In addition, some of the interview panelists' notes may contain individually identifiable information about the applicants who were interviewed. Individually identifiable notes would also fall within the exception for "a clearly unwarranted invasion of privacy" and, therefore, must be kept confidential under this other exception as well.

FACTS

The Judiciary issued an "Open Competitive Examination Announcement" for the position of Program Budget Analyst VII. Applicants who applied for the position were ranked according to their competitive examination scores. The top five ranked applicants were interviewed separately and given a score by each interview panelist. The interview scores summary shows the

scores given by the interview panelists to the applicants, each of whom is not individually identified but is instead designated by an alphabetical letter in the summary. A blank copy of the interview scores summary form is attached hereto as Exhibit "A." In addition, the interview panelists took notes during each applicant's interview.

Hawaii Government Employees Association/American Federation of State, County and Municipal Employees ("HGEA/AFSCME") represents an unsuccessful applicant in an appeal before the Judiciary Personnel Appeals Board. HGEA/AFSCME and the Judiciary agree that the unsuccessful applicant's appeal does not constitute a grievance under chapter 89, Hawaii Revised Statutes, and that, therefore, the provisions of chapter 89 do not apply to the pending appeal.

On behalf of the unsuccessful applicant, HGEA/AFSCME requested the Judiciary to provide copies of certain records relating to the interview process for the Program Budget Analyst VII position, including the interview scores summary and the interview panelists' notes with the applicants' names deleted. The Judiciary disclosed the information that HGEA/AFSCME requested, except for the interview scores summary and the interview notes. In its response dated October 2, 1991, the Judiciary stated that it would not disclose this information because to do so would constitute a clearly unwarranted invasion of privacy. You requested the OIP to render an advisory opinion regarding whether, under the UIPA, the Judiciary is required to disclose the interview scores summary and the interview panelists' notes when the applicants' names are not shown or are removed from these records.

DISCUSSION

I. INTRODUCTION

According to the Judiciary, the interview scores summary and the interview panelists' notes are maintained by the Judiciary's Budget and Planning Office, the division in which the Program Budget Analyst VII position was filled. Therefore, these documents are "government records," as this term is defined by the UIPA, because they constitute "information

maintained by an agency in written form."¹ Haw. Rev. Stat. . 92F-3 (Supp. 1990).

The UIPA sets forth the general rule that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1990). Section 92F-13, Hawaii Revised Statutes, sets forth exceptions to this general rule, two of which are relevant to the interview scores summary and the interview panelists' notes. In pertinent part, this section provides:

.92F-13 Government records; exceptions to general rule. This chapter shall not require disclosure of:

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

. . . .

(3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

Haw. Rev. Stat. . 92F-13(1), (3) (Supp. 1990). These two exceptions will be discussed below with respect to the interview scores summary and the interview panelists' notes.

¹The UIPA's definition of "agency" expressly excludes the "nonadministrative functions of the courts of this State." Haw. Rev. Stat. . 92F-3 (Supp. 1990). In OIP Op. Ltr. No. 90-4 (Jan. 29, 1990), we previously opined that "nonadministrative records of the courts, generally speaking, are those records which are provided to the court incident to the adjudication of a legal matter before that tribunal," such as the charging documents, complaints, motions, pleadings, orders, and decisions. OIP Op. Ltr. No. 90-4 at 5-6. Based upon the foregoing analysis, we believe that the interview scores summary and the interview panelists' notes do not fall within the category of "nonadministrative records" as described and, instead, are administrative records subject to the provisions of the UIPA.

II. SUMMARY OF INTERVIEW SCORES

In OIP Opinion Letter No. 90-14 (March 30, 1990), the OIP concluded that individuals' civil service application examination scores ("exam scores") are confidential because they are protected by the UIPA exception for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of privacy." Haw. Rev. Stat. . 92F-13(1) (Supp. 1990).

In addition, we found that the disclosure of this information also fell within the scope of the UIPA exception for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function" because this disclosure would discourage individuals from applying for other civil service positions. See OIP Op. Ltr. 90-14 (March 30, 1990).

However, in that opinion, we noted that the described exceptions to disclosure do not apply to the examination scores when all individually identifying information is removed. See id.; see also Bowie v. Evanston Community Consol. School Dist. No. 65, 538 N.E.2d 557 (Ill. 1989). Therefore, we concluded that if the examination scores are maintained in a readily retrievable form and can reasonably be segregated from information identifying the individuals, the exam scores must be disclosed after the deletion of individually identifying information. Yet, where an examination score can be identified with the respective individual even after segregation, then disclosure to the public will not be permitted in order to protect the individual's right to privacy. See id.; see also Clemins v. United States Dep't of Treasury, etc., 457 F. Supp. 13 (D.D.C. 1977).

According to the facts presented, the interview scores summary does not set forth the applicants' names, but rather refers to each applicant by an alphabetical letter. Because the interview scores summary does not reveal the identities of the applicants who received the corresponding scores, we find that the applicants do not have a privacy interest in this record. See, e.g., Arieff v. United States Dep't of the Navy, 712 F.2d 1462 (D.C. Cir. 1983) (list of prescription drugs supplied by the Navy to the Office of Attending Physician to Congress that contained no information about individual users); Citizens for Environmental Quality v. United States Dep't of Agriculture, 602 F. Supp. 534 (D.D.C. 1984) (health test results of unidentified employee).

In each of the federal cases cited, the court found that the record at issue could not be identified with a particular individual and, therefore, the record did not fall within the scope of the "clearly unwarranted invasion of privacy" exemption of the federal Freedom of Information Act ("FOIA"), 5 U.S.C. . 552(b)(6). Furthermore, "[a]n increased likelihood of speculation as to the subject of the [record] is insufficient to invoke the exception. Only the likelihood of actual identification justifies withholding the requested documents under exemption (b)(6)." Citizens for Environmental Quality, 602 F. Supp. at 538 (citing Arief, 712 F.2d at 1468); see also Dep't of the Air Force v. Rose, 425 U.S. 352 (1976) (case summaries of honor and ethics hearings at the Air Force Academy, with identifying information deleted).

Even if the applicants are assumed to have some privacy interest in the interview scores summary, we find that there is at least a "scintilla" of public interest in the interview scores summary because it sheds light on the government's hiring practices. Thus, the disclosure of the interview scores summary would not constitute a clearly unwarranted invasion of privacy under the UIPA. See Haw. Rev. Stat. . 92F-14(a) (Supp. 1990); Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) ("[i]f the privacy interest is not 'significant', a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy").

Furthermore, the disclosure of the interview scores summary would not frustrate a legitimate government function because this record does not reveal any individually identifiable information about applicants which, if disclosed, would discourage future applicants for other positions. See OIP Op. Ltr. No. 90-14 (March 30, 1990). Consequently, we find that no UIPA exception applies to the interview scores summary and, therefore, this record must be made available for public inspection and copying.

III. INTERVIEW PANELISTS' NOTES

The OIP previously opined that the "frustration of a legitimate government function" exception contained in section 92F-13(3), Hawaii Revised Statutes, applies to certain intra-agency and inter-agency memoranda that are "predecisional" and "deliberative" because their disclosure would frustrate the

legitimate government function of agency decisionmaking. See, e.g., OIP Op. Ltr. No. 90-8 (Feb. 12, 1990) (drafts and staff notes); OIP Op. Ltr. No. 91-16 (Sept. 19, 1991) (draft master plan); see also OIP Ltr. No. 90-21 (June 20, 1990) (consultant's report). Intra-agency or inter-agency memoranda are "predecisional" when they are received before a decision is made and "deliberative" when they reflect the "give and take" of the agency's consultative process. See OIP Op. Ltr. No. 90-8 (Feb. 12, 1990).

In particular, in OIP Opinion Letter No. 90-8 (Feb. 12, 1990), the OIP opined that the "frustration of a legitimate government function" exception applies to staff notes written in the course of an investigation of an alleged zoning violation. The notes at issue contained some factual information commingled with employees' personal judgments and conclusions. As we concluded, such notes were predecisional and deliberative, and their disclosure would "chill" the free exchange of opinions and ideas during the investigative process. See OIP Op. Ltr. No. 90-8 (Feb. 12, 1990).

Similarly, we believe that the interview panelists' notes are predecisional and deliberative because they reflect the "give and take" that occurs within the agency before the applicant selection. Although some of the interview panelists' notes may reflect factual information, we find that this information is "inextricably intertwined" with the interview panelists' personal judgments and observations. See Cities Service Co. v. Federal Trade Commission, 627 F. Supp. 827, 836 (D.D.C. 1984) ("selection of relevant facts [in meeting notes] reflected each author's weighing and evaluation of matters considered significant"). Therefore, we believe that the interview panelists' notes are not required to be disclosed in order to "avoid the frustration of a legitimate government function," namely, the decisionmaking that occurs during the selection process. Haw. Rev. Stat. . 92F-13(3) (Supp. 1990). Cf. Roulette v. Dep't of Central Management Services, 490 N.E.2d 60 (Ill. App. Ct. 1986).

In Roulette, the court recognized that a psychologist consultant's interview notes of applicants for a police officer position "undoubtedly reveal his assessment of plaintiff's responses to questions posed during the interview." Id. at 63. However, the court found that the disclosure of interview notes would frustrate a legitimate government function other than decisionmaking. Specifically, the court found that if the

interview notes were publicly disclosed, the government agency's "testing program would be frustrated because the psychologist would be unable to elicit candid and spontaneous responses" from future applicants. Id.; see also Shevin v. Byron, Harless, Schaffer, Reid and Associates, 379 So.2d 633 (Fla. 1980) (consultant interview notes of applicants for managing director position in an agency are merely preliminary materials intended to aid the consultant).

Furthermore, even if the applicants' names are not revealed in the interview panelists' notes, some of the notes may contain other individually identifiable information about the applicants who were interviewed. Thus, in addition to our finding that the "frustration of a legitimate government function" exception applies to the interview panelists' notes, we believe that the individually identifiable notes also must be kept confidential under the "clearly unwarranted invasion of personal privacy" exception. See OIP Op. Ltr. No. 90-14 (March 30, 1990) (comments provided on the certified list of eligibles); OIP Op. Ltr. No. 89-2 (Oct. 27, 1989) (narrative comments about employment candidates); see also Ripskis v. Dep't of Housing and Urban Development, 746 F.2d 1 (D.C. Cir. 1984); Clemins v. United States Dep't of Treasury, etc., 457 F. Supp. 13 (D.D.C. 1977).

CONCLUSION

Because the interview scores summary does not reveal the identities of the applicants who received the corresponding scores, the disclosure of the interview scores summary would not constitute a clearly unwarranted invasion of privacy under the UIPA. Furthermore, the disclosure of the interview scores summary would not frustrate a legitimate government function because this record does not reveal any individually identifiable information about applicants which, if disclosed, would discourage future applicants for other positions. Consequently, we find that no UIPA exception applies to the interview scores summary and, therefore, this record must be made available for public inspection and copying.

The interview panelists' notes are not required to be disclosed in order to "avoid the frustration of a legitimate government function," namely, the decisionmaking that occurs during the selection process. Haw. Rev. Stat. . 92F-13(3) (Supp. 1990). Furthermore, individually identifiable notes

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about applicants must also be kept confidential in order to prevent a clearly unwarranted invasion of the privacy interests of the identifiable applicants.

Very truly yours,

Lorna J. Loo
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

LJL:sc
Attachment

c: Dr. Irwin Tanaka
Administrative Director of the Courts

The Honorable Herman T. F. Lum
Chief Justice of the Supreme Court of Hawaii